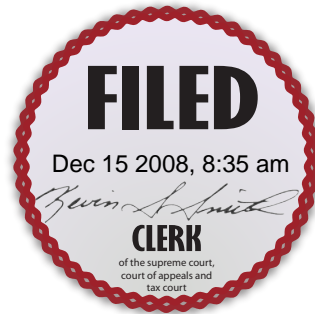


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

VERNON BATEMAN,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A04-0805-PC-280

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-9802-CF-34

December 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Vernon Bateman appeals the post-conviction court's denial of his petition for post-conviction relief ("PCR"). On appeal, Bateman raises five issues, which we restate as whether the post-conviction court properly denied relief on his claims of: 1) newly discovered evidence; 2) violation of his confrontation rights; 3) prosecutorial misconduct; 4) ineffective assistance of trial counsel; and 5) ineffective assistance of appellate counsel. Concluding claims two and three are waived because Bateman did not raise them on direct appeal,¹ claim four is governed by res judicata, and the post-conviction court did not err in denying relief on claims one and five, we affirm.

Facts and Procedural History

The facts as described by this court in its decision on direct appeal are:

In the early morning hours of January 23, 1998, A.T. left her apartment in Gary to use a pay phone. Bateman, accompanied by two friends, approached A.T. with a gun. He told A.T. that she was "going with them to hook him and his boys up." A.T. walked with the men to a nearby house where Bateman ordered her to have oral sex with one of his confederates. The second man then raped A.T., after which Bateman forced her to have vaginal and rectal sex with him. During the sex acts, the assailants passed the gun among themselves. At one point, it was aimed at A.T.'s head.

After the incident, A.T. ran back to her apartment. She summoned the police who found one of the men still sleeping at the house, the gun lying beneath him. The following month, A.T. identified Bateman from a photographic array. The State charged [Bateman] with rape, criminal deviate conduct[,], and confinement.

A.T. did not appear [to testify at] trial on September 14, 1998, but the State presented testimony from three other witnesses. After A.T. did not appear the next day, the State successfully moved for a continuance until September 21, 1998. On that date, during the State's case-in-chief, A.T. was shown the photographic array. She explained that she had

¹ Although we hold that Bateman has waived review of issues two and three by failing to include them in his direct appeal, to the extent that it is necessary for resolution of Bateman's ineffective assistance of appellate counsel claims, and solely for that limited purpose, we address the merits of these claims below.

previously identified Bateman from the array and then, at the bequest of the State, A.T. walked over to Bateman and identified him as the perpetrator. Bateman was found guilty as charged”

Bateman v. State, No. 45A03-9811-CR-461, slip op. at 2-3 (Ind. Ct. App., Aug. 24, 1999) (citations omitted).

Bateman appealed his conviction raising a single issue, whether he received ineffective assistance of trial counsel in light of trial counsel’s failure to object to the continuance of the trial so that the State could obtain the testimony of A.T. and to the use of the photographic array at trial. This court affirmed Bateman’s conviction. Id., slip op. at 5.

On November 6, 2003, A.T. gave a taped statement to Bateman’s PCR counsel in which she stated Bateman was not one of the men who raped her. A.T. further stated she only identified Bateman as one of the rapists because Corporal Banks of the Gary Police Department, prior to showing her the photographic array, had told her that Bateman was one of the men who had raped her. On November 18, 2003, A.T. signed a typed letter addressed to the Lake County Prosecutor, and on April 8, 2004, A.T. gave a statement under oath to Bateman’s PCR counsel, both of which contained essentially the same claims as the taped statement.

On March 15, 2007, Bateman filed a petition for PCR raising five issues: 1) newly discovered evidence stemming from A.T.’s statements recanting her identification of Bateman as one of the men who raped her; 2) denial of the right to confront and cross-examine witnesses related to the admission into evidence of statements made to police by a co-defendant who did not testify at trial identifying Bateman as a suspect; 3)

prosecutorial misconduct related to the disappearance of a sexual assault kit used to take DNA samples from A.T. following the rape; 4) ineffective assistance of trial counsel; and 5) ineffective assistance of appellate counsel. The post-conviction court held a hearing on Bateman's petition on January 9, 2008. A.T. testified at the hearing with the assistance of independent counsel. A.T. reaffirmed her identification of Bateman as one of the men who raped her, testified she had positively identified Bateman in the photographic array and at his trial, and explained she had lied in her statements to Bateman's PCR counsel. A.T. further testified Bateman's sister paid her \$100 to say that Bateman was not one of the men who had raped her. A.T. explained that at the time of her statements to Bateman's PCR counsel, she had a drug addiction and needed the money to purchase drugs. Bateman's sister also testified at the hearing and denied paying any money to A.T. for her statements.

The post-conviction court issued findings of fact and conclusions of law denying Bateman's petition for PCR on April 11, 2008. Specifically, the post-conviction court found:

The petitioner bears the burden to show that appellate counsel was ineffective. He has failed to do so. The petitioner presented no evidence that appellate counsel failed to review the record or otherwise exercise due diligence. The petitioner presents no evidence to show that counsel's knowledge of the law was or is lacking. Indeed, when questioned about the petitioner's right to confrontation, counsel acknowledged the rule under Crawford v. Washington, but correctly volunteered that Crawford post-dates Mr. Bateman's trial. We conclude that the evidence does not support a finding of appellate ineffectiveness. We conclude appellate counsel was effective. Therefore, all claims herein were waived when they were not raised on direct appeal with the exception of ineffective assistance of trial counsel, which is res judicata, and the claim that [A.T.] recanted her testimony subsequent to Bateman's trial.

Appellant's Appendix at 165-66 (citations omitted). The post-conviction court also found A.T.'s testimony at the post-conviction hearing regarding the identity of Bateman as one of the rapists believable and therefore found that her statements recanting her trial testimony did not rise to the level of newly discovered evidence to warrant a new trial.

Discussion and Decision

I. Standard of Review

To obtain relief, a petitioner in a post-conviction proceeding bears the burden of establishing his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's conclusions of law. Martin v. State, 740 N.E.2d 137, 139 (Ind. Ct. App. 2000). Moreover, a petitioner who appeals a denial of a petition for PCR, appeals from a negative judgment and therefore must establish "that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002).

II. PCR Claims

A. Newly Discovered Evidence

Bateman first argues that the post-conviction court erred when it denied his demand for a new trial in light of newly discovered evidence.

[N]ew evidence will mandate a new trial only when the defendant demonstrates that: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8)

it can be produced upon a retrial of the case; and (9) it will probably produce a different result at trial.

Taylor v. State, 840 N.E.2d 324, 329-30 (Ind. 2006) (quoting Carter v. State, 738 N.E.2d 665, 671 (Ind. 2000)). “[N]ewly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized.” Id. (quoting Reed v. State, 508 N.E.2d 4, 6 (Ind. 1987)). The decision to grant or deny a request for a new trial based on newly discovered evidence rests with the post-conviction court, and we will not disturb that decision absent a showing of abuse of discretion. Lottie v. State, 444 N.E.2d 306, 308 (Ind. 1983).

At trial, A.T. testified that she had positively identified Bateman in a photo array presented to her by Corporal Banks. A.T. also testified that Corporal Banks did not coach her, tell her that she had to choose someone in the photo array, or tell her Bateman’s name prior to her identification. Following the trial, A.T. gave a taped statement, gave a sworn statement, and wrote a letter to the Lake County Prosecutor, in each of which she recanted her trial testimony and indicated that she could not positively identify Bateman as one of the men who raped her and that Corporal Banks had coached her into selecting his picture from the photo array. Bateman presented these statements to the post-conviction court as newly discovered evidence warranting a new trial.

However, A.T. also testified in person at the PCR hearing. There, A.T. recanted the statements made to Bateman’s PCR counsel and the letter and reaffirmed her trial testimony by positively identifying Bateman as one of the rapists. A.T. explained that at the time she made the statements, she had a drug addiction and that Bateman’s sister offered her \$100 to recant her testimony. The conflict between A.T.’s in-court testimony

and her out-of-court statements and letter creates an issue of credibility for the post-conviction court to determine. See Woods v. State, 701 N.E.2d 1208, 1210 (Ind. 1998) (The post-conviction court “is the sole judge of the weight of the evidence and the credibility of witnesses.”). The post-conviction court weighed the evidence and found A.T.’s post-conviction testimony believable, thus it found the statements and letter not worthy of credit. At best, the conflicting statements impeach the credibility of A.T.’s trial testimony. However, such impeachment evidence is not allowable as newly discovered evidence. Taylor, 840 N.E.2d at 330. In addition, Bateman has failed to demonstrate that he could produce the newly discovered evidence at trial since A.T. recanted her prior statements and letter before the post-conviction court and would almost certainly do the same in a subsequent new trial. Therefore, the post-conviction court did not err when it denied Bateman’s demand for a new trial based on newly discovered evidence.

B. Violation of Confrontation Rights

Second, Bateman argues that the admission of testimony regarding statements made by a co-defendant identifying Bateman as a suspect in the crime violated his Sixth Amendment right to confront witnesses used against him. Bateman failed, however, to raise this issue in his direct appeal. A PCR is not a super appeal; it is well established that issues that could have been raised on direct appeal are not available in post-conviction proceedings. Woods, 701 N.E.2d at 1213. Bateman did not raise the issue of

confrontation of witnesses in his direct appeal, and therefore the issue is waived for PCR and our subsequent review.²

C. Prosecutorial Misconduct

Third, Bateman argues that the State committed prosecutorial misconduct by withholding from him the results of testing conducted on a sexual assault kit. Pursuant to Kyles v. Whitley, 514 U.S. 419 (1995) and Brady v. Maryland, 373 U.S. 83 (1963), the State has an affirmative duty to disclose material evidence favorable to the defendant. Johnson v. State, 827 N.E.2d 547, 551 (Ind. 2005).³ To prove a Brady claim, a defendant must show: “(1) that the evidence at issue is favorable to the accused, because it is either exculpatory or impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the evidence was material to an issue at trial.” Prewitt v. State, 819 N.E.2d at 401. Evidence is material only where there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different. Id. at 402. However, “the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Id.

² Additionally, Bateman has not supplied this court with adequate authority to support his argument. Bateman supports his argument with citation to Crawford v. Washington, 541 U.S. 36 (2004), and subsequent decisions by our supreme court and by this court applying Crawford in Indiana. However, all of these cases post-date Bateman’s trial and this court’s decision on direct appeal by several years. The rule announced in Crawford may not be applied in a collateral attack by a petitioner whose conviction was final on direct appeal prior to the Crawford decision. See Whorton v. Bockting, 127 S.Ct. 1173, 1181-84 (2007). Therefore, Bateman’s arguments on this issue lack citation to pertinent authority and are of no avail.

³ Breach of this duty to disclose material evidence is referred to as a Brady violation. See, e.g., Prewitt v. State, 819 N.E.2d 393, 400 (Ind. Ct. App. 2004), trans. denied.

Following her rape, A.T. went to Methodist Hospital Northlake Campus in Gary, Indiana. There, a nurse took samples of saliva, hair, semen, and blood and secured them for retrieval by the police. The State never attempted to use any evidence from the sexual assault kit at the trial, and Bateman provided no evidence to the post-conviction court that he attempted to obtain the test results prior to or during the trial. Although no evidence was presented as to whether the sexual assault kit samples still exist, the parties stipulated to the post-conviction court that the samples never arrived at the crime lab for testing.

Bateman again failed to raise this issue in his direct appeal. A claim of withholding exculpatory evidence is waived if not raised on direct appeal. Williams v. State, 808 N.E.2d 652, 665 (Ind. 2004). Bateman did not raise the issue of prosecutorial misconduct in his direct appeal, and therefore the issue is waived for PCR and our subsequent review.⁴

D. Ineffective Assistance of Trial Counsel

Bateman argues that he received ineffective assistance of trial counsel. Bateman previously litigated this issue in his direct appeal. When the appellate court decides an issue on direct appeal, the doctrine of res judicata applies, thereby precluding review of the issue in a PCR proceeding. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). Once a defendant chooses to raise a claim of ineffective assistance of trial counsel (whether on direct appeal or in a PCR), he must raise all issues relating to that claim. Id. at 259. A reviewing court's resolution of an ineffective assistance of trial counsel claim

⁴ Additionally, Bateman has presented no evidence that the State possessed any test results taken from the samples in the sexual assault kit, that such results even exist, or that the results would have been exculpatory to Bateman. Certainly, Bateman has presented no evidence that the State wrongfully withheld the test results, since there is no evidence that he ever made a formal motion to the trial court for their production.

on direct appeal constitutes res judicata and bars a defendant from relitigating the issue in a PCR even where he presents additional examples of his trial counsel's alleged ineffectiveness. Id.

In his direct appeal, Bateman raised, and this court rejected, a claim of ineffective assistance of trial counsel. Bateman, No. 45A03-9811-CR0-461, slip. op. at 3-5. Despite the fact that Bateman attempts to raise new allegations of ineffectiveness, this court's previous decision on the issue is res judicata and bars Bateman from relitigating the issue in a PCR and in this subsequent appeal. Therefore, the post-conviction court did not err when it denied Bateman relief on his claims of ineffective assistance of trial counsel.

E. Ineffective Assistance of Appellate Counsel

Finally, Bateman argues that he received ineffective assistance of appellate counsel because his appellate counsel failed to raise the following issues on direct appeal: 1) the admission of testimony regarding statements made by a co-defendant identifying Bateman as a suspect in the crime; and 2) failure of the State to disclose the results of testing done on samples from the sexual assault kit.⁵

The Sixth Amendment entitles a criminal defendant to the effective assistance of counsel, not only at trial, but also during his first appeal as of right. Ben-Yisrayl, 738 N.E.2d at 260 (citing Evitts v. Lucey, 469 U.S. 387, 396 (1985)). We analyze an ineffective assistance of appellate counsel claim similarly to an ineffective assistance of trial counsel claim using the two-prong test set out in Strickland v. Washington, 466 U.S.

⁵ Bateman also argues a third basis which he titles "Breakdown in the Adversarial Process" and describes as the failure of trial counsel to "put forth any defense to the charges." However, Bateman does not offer any argument supported by cogent reasoning and citations to authority. Simply asserting a legal conclusion, without any cogent argument or citation to authority, is not enough establish error. See Ind. Appellate Rule 46(A)(8)(a) and (b); Absher v. State, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007).

668 (1984). Ben-Yisrayl, 738 N.E.2d at 260. First, the petitioner must show that appellate counsel's performance was deficient or fell below an objective standard of reasonableness; second, the petitioner must show that the deficient performance actually prejudiced the defense. Strickland, 466 U.S. at 687-88. In other words, the petitioner must show that but for appellate counsel's deficient performance, there is a reasonable probability that the result of the appeal would have been different. Id. at 694. Failure to satisfy either prong will cause the claim to fail. Henley v. State, 881 N.E.2d 639, 645 (Ind. 2008). If we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. Id.

Bateman first argues that his appellate counsel failed to raise the issue of the admission of testimony regarding statements made by a co-defendant identifying Bateman as a suspect in the crime. As we discussed above, Bateman's argument on this issue relies on the Supreme Court's decision in Crawford and various state court cases interpreting and applying Crawford to state law. However, all of the authority cited by Bateman postdates his trial and this court's decision on direct appeal by several years. Counsel "cannot be held ineffective for failing to anticipate or effectuate a change in the existing law." See Trueblood v. State, 715 N.E.2d 1242, 1258 (Ind. 1999), cert. denied.

Second, Bateman argues that appellate counsel was ineffective for failing to raise the issue of the State's failure to produce the results of the sexual assault kit samples. As discussed above, Bateman has not met the requirements for establishing a Brady violation. Specifically, Bateman presented no evidence that the results exist, that the State ever possessed such results, or that the results would be exculpatory. In fact,

Bateman stipulated to the post-conviction court that the sexual assault kit never reached the crime lab at all, which would seem to preclude the possibility of the existence of test results. As a result, Bateman has failed to demonstrate that he was prejudiced by appellate counsel's failure to raise a Brady violation claim.⁶

Bateman received effective assistance of appellate counsel. Therefore the post-conviction court did not err when it denied Bateman relief on his ineffective assistance of appellate counsel claims.

Conclusion

Bateman has failed to meet the requirements for a new trial based on newly discovered evidence. Bateman failed to raise the issues of violation of his confrontation rights and prosecutorial misconduct on direct appeal, and, as a result, he has waived review of those issues on PCR and in this appeal. Additionally, Bateman's claim of ineffective assistance of trial counsel is governed by res judicata. Finally, Bateman has failed to demonstrate any ineffective assistance of appellate counsel. Therefore, the post-conviction court did not err when it denied Bateman relief on all of the claims in his PCR petition.

Affirmed.

NAJAM, J., and MAY, J., concur.

⁶ To the extent that Bateman attempts to raise an ineffective assistance of appellate counsel claim based on a failure to adequately argue the issue of ineffective assistance of trial counsel, the discussion above also applies to trial counsel, and Bateman has failed to demonstrate any ineffectiveness.